Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-45

GERALD A. LEWIS, Comptroller of the State of Florida and Commissioner of Banking of the State of Florida,

Appellant,

-vs-

BT INVESTMENT MANAGERS, INC. and BANKERS TRUST NEW YORK CORPORATION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF FLORIDA, TALLAHASSEE DIVISION

Filed July 10, 1979
Probable Jurisdiction Noted October 1, 1979

IN THE

Supreme Court of the United States

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No. 79-45

GERALD A. LEWIS, Comptroller of the State of Florida and Commissioner of Banking of the State of Florida,

Appellant,

-vs-

BT INVESTMENT MANAGERS, INC. and BANKERS TRUST NEW YORK CORPORATION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF FLORIDA, TALLAHASSEE DIVISION

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[Exhibits have been omitted in printing]

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Stipulation of Facts, filed May 11, 1978..... 22

Exhibits attached to Stipulation:

Exhibit A - Order of the Board of Governors of the Federal Reserve System, dated April 26, 1973..... 26

[Remaining exhibits have been omitted in printing]

The following opinions, decisions and orders have been omitted in printing this appendix because they appear on the following pages in the appendix to the blue printed Jurisdictional Statement:

Order of District Court for the Northern District of Florida, accompanying Opinion, entered December 15, 1978.....A1

Opinion of District Court for the Northern District of Florida, Tallahassee Division, dated December 15, 1978.....B1

Order of District Court for the Northern District of Florida, Tallahassee Division accompanying Opinion, entered March 22, 1979.....D1

Opinion-Order of District Court for the Northern District of Florida, on Reclarification and Reconsideration, dated March 22, 1979.....E1

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

October 24, 1973 - Plaintiffs' Complaint filed in U.S. District Court for the Northern District of Florida, Tallahassee Division.

November 15, 1973 - Defendant's Motion to Dismiss.

November 30, 1973 - Order entered constituting three judge court.

December 3, 1973 - Order of Chief Judge John R. Brown, U.S. Court of Appeals, Fifth Circuit, reconstituting the three judge court naming the Honorable Paul H. Roney as U.S. Circuit Judge in place of Judge David W. Dyer.

January 1, 1974 - Florida Bankers Association filed Petition for Leave to appear as Amicus Curiae. Granted February 14, 1974.

March 15, 1974 - Defendant's Supplement to Motion to Dismiss.

July 29, 1974 - Opinion-Order dismissing Complaint on the basis of "abstention" doctrine.

September 26, 1974 - Plaintiffs filed Notice of Appeal to the United States Supreme Court.

May 16, 1975 - United States Supreme Court denies jurisdiction, vacates District Court's Order, and remands so that fresh order may be entered from which a timely appeal may be taken to the U.S. Court of Appeals for the Fifth Circuit.

May 22, 1975 - Plaintiffs filed Motion for Designation of of Additional Judge.

November 17, 1975 - Order filed by Chief Judge John R. Brown, U.S. Court of Appeals, Fifth Circuit, reconstituting three judge court.

December 1, 1975 - Fresh Order entered dismissing cause without prejudice on "abstention" grounds, and substituting Gerald A. Lewis as party defendant.

December 30, 1975 - Notice of Appeal to U.S. Court of Appeals, Fifth Circuit, filed by plaintiffs.

October 17, 1977 - Received Judgment of U.S. Court of Appeals, Fifth Circuit, reversing and remanding cause to three judge court, issued as mandate on October 13, 1977.

November 21, 1977 - Order directing defendant to answer complaint by December 12, 1977.

December 12, 1977 - Defendant's Answer filed.

May 11, 1978 - Stipulation of facts filed by parties' attorneys.

September 1, 1978 - Three judge final hearing held.

December 15, 1978 - Final Order and Opinion, declaring Florida Statutes § 660.10 (1977) and the first sentence of Florida Statutes § 659.141(1) (1977), unconstitutional. Defendant enjoined from enforcing provisions of § 659.141 (1).

December 26, 1978 - Defendant filed Motion for Clarification, Reconsideration and to Alter and Amend Judgment.

March 22, 1979 - Order granting in part, defendant's Motion for Clarification and Order altered in part. Motion denied in all other respects.

April 20, 1979 - Defendant filed protective Notice of Appeal to U.S. Court of Appeals, Fifth Circuit.

April 27, 1979 - Defendant filed Motion for Order Suspending Injunction and Staying Declaratory Judgment During Pending of Appeal.

May 11, 1979 - Defendant filed Notice of Appeal to United States Supreme Court.

June 4, 1979 - Defendant filed with Court of Appeals, Motion to Stay Further Proceedings in Appeal, pending any jurisdictional question in the U.S. Supreme Court. Granted by Clerk of Fifth Circuit. (motion unopposed)

June 19, 1979 - Order of District Court denying Motion for Order Suspending Injunction and Staying Declaratory Judgment During Pending of Appeal.

October 5, 1979 - Filed certified copy of U.S. Supreme Court noting probable jurisdiction.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION
Civil No. 73-184

BT INVESTMENT MANAGERS, INC., and
BANKERS TRUST NEW YORK CORPORATION,

Plaintiffs,

vs.

FRED O. DICKINSON, JR., Comptroller of
the State of Florida and Commissioner of
Banking of the State of Florida,

Defendant.

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF
Filed October 24, 1973

Plaintiffs, by and through their attorneys, bring this action against defendant and allege:

COUNT I

1. This is an action for declaratory judgment under the provisions of 28 U.S.C. § 2201, seeking to declare unconstitutional a portion of subsection (1) of §659.141 of Chapter 659 of the Florida Statutes and for permanent injunction restraining the enforcement, operation and execution of the challenged statute and of any rules, regulations, interpreta-

tions or directives which have been or may be promulgated thereunder. [Section 659.141 of the Florida Statutes, a portion of subsection (1) of which is challenged by plaintiffs as unconstitutional, is attached hereto as Appendix A and is referred to herein as the "challenged statute".] Jurisdiction is conferred on this Court by 28 U.S.C. §§ 1331, and 1343(3), and a hearing before a Three Judge Court is prayed for pursuant to provisions of 28 U.S.C. § 2281, *et seq.* The amount in controversy exceeds $10,000.00 exclusive of interest and costs.

2. Plaintiff BT Investment Managers, Inc., is a corporation organized under the laws of the State of Delaware, with total authorized capital stock of $1,000.00, consisting of 1,000 shares of common stock with a par value each of $1.00. On November 27, 1972, BT Investment Managers, Inc., qualified under the laws of the State of Florida to do business in Florida. The offices of BT Investment Managers, Inc., will be located in Palm Beach, Florida. The Certificate of Incorporation of BT Investment Managers, Inc., was filed on November 24, 1972.

3. Plaintiff Bankers Trust New York Corporation is a corporation organized under the laws of the State of New York, and is a "bank holding company" within the meaning of the Bank Holding Company Act, 12 U.S.C. §1841, *et seq.* Bankers Trust New York Corporation, acting through several of its officers and agents, assisted in the organization of BT Investment Managers, Inc., as a body corporate under the laws of the State of Delaware.

4. The defendant Fred O. Dickinson, Jr., is the Comptroller of the State of Florida, ex officio Commissioner of Banking of the State of Florida, and head of the Department of Banking and Finance of the State of Florida, and is charged with supervisory authority over state-chartered banks

and trust companies.

5. Section 4(c)(8) of the Bank Holding Company Act, 12 U.S.C. §1843(c)(8), authorizes a bank holding company, with the approval of the Board of Governors of the Federal Reserve System, to acquire the shares of any company the activities of which the Board has determined to be so closely related to banking or managing or controlling banks as to be a proper incident thereto. The Board of Governors of the Federal Reserve System has provided by regulation that "[a]cting as investment or financial advisor" is an activity "so closely related to banking or managing or controlling banks as to be a proper incident thereto". 12 C.F.R. § 225.4(a)(5).

6. Section 659.141(1) of the Florida Statutes, prior to December 21, 1972, generally prohibited any "bank, trust company, or holding company, the operations of which are principally conducted outside [Florida]", from acquiring or retaining all or substantially all of the assets of, or control over, "any business organization having a place of business in [Florida] where or from which it furnishes investment advisory services to trust companies or banks in [Florida]". By virtue of an amendment which became effective on December 21, 1972, the prohibition was extended to the furnishing of investment advisory services to any person rather than, as theretofore, only to Florida trust companies and banks. This amendment to Section 659.141(1) disqualifies any business organization having a place of business in the State of Florida from furnishing investment advisory services in Florida at or from such place of business if such business organization is owned or controlled by a bank, trust company or bank holding company the operations of which are principally conducted in another State.

7. On October 3, 1972, Bankers Trust New York

Corporation applied to the Board of Governors of the Federal Reserve System, pursuant to 12 U.S.C. § 1843(c)(8) and 12 C.F.R. § 225.4(b)(1), for authority to engage, through its subsidiary BT Investment Managers, Inc., in the following activity from an office of BT Investment Managers, Inc., located in Palm Beach, Florida: The activity of acting as an investment and financial advisor to the extent of providing portfolio investment advice to any person other than a Florida bank or trust company and furnishing general economic information and advice, general economic statistical forecasting services and industry studies.

8. On April 26, 1973, the Board of Governors of the Federal Reserve System issued an Order relating to the application of Bankers Trust New York Corporation referred to in paragraph 7 denying the proposal to act as an investment advisor. The Order states that:

> "Absent the recent enactment of amendments to section 659.141 and any evidence indicating that *de novo* entry in this case would have the purpose or effect of foreclosing future competition or would otherwise be contrary to the public interest, it appears likely that the Board would have approved the instant proposal.***However, while the instant proposal was pending before the Board, the Florida Statutes were amended to generally prohibit the provision of investment advisory services in Florida by non-Florida-based bank holding companies through control of business organizations having offices in Florida.***
>
> "In addition to the factors that the Board is, by statute, required to consider, the Board, in any particular case, must determine whether the proposal would be prohibited by State law. If the proposal would be so prohibited, the Board may not approve it. In making such a determination, the Board will presume the constitutional validity of any pertinent State statute.***
>
> "***BTNYC's challenge to the constitutionality of any provision of the recently-enacted Florida legislation is properly cognizable only by the judiciary. In brief, since the Board is of the opinion that the proposal is prohibited by State law, it believes that, under the doctrine set forth by the U.S. Supreme Court in *Whitney*, it must deny the proposal." (Footnotes omitted)

A copy of this Order is attached as Appendix B hereto.

9. But for the protest by defendant and representatives of the Florida Bankers Association, the application of Bankers Trust New York Corporation referred to in paragraph 7, would have been granted and BT Investment Managers, Inc., would have been authorized by operation of law to engage in the investment advisory business in Palm Beach, Florida, prior to the effective date of the challenged statute.

10. BT Investment Managers, Inc., is amenable to process issued by the Courts of the State of Florida, and is ready, willing and able to comply with all lawful statutory, regulatory or supervisory provisions governing the conduct of the investment advisory business in Florida.

11. The challenged statute is not designed to promote lawful regulatory objectives, but is intended to shelter those organizations presently conducting an investment advisory business in Florida from competition by BT Investment Managers, Inc., by preventing BT Investment Managers, Inc., from marketing investment advisory services in Florida.

12. The challenged statute unlawfully discriminates against BT Investment Managers, Inc., and Bankers Trust New York Corporation and deprives BT Investment Managers, Inc., and Bankers Trust New York Corporation of liberty and property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

13. The challenged statute unlawfully discriminates against BT Investment Managers, Inc., and denies to BT Investment Managers, Inc., the equal protection of the laws of the State of Florida, in contravention of the Fourteenth Amendment to the Constitution of the United States.

14. The challenged statute unlawfully suppresses commercial intercourse between Bankers Trust New York Corporation and BT Investment Managers, Inc., in prohibiting Bankers Trust New York Corporation from establishing, owning, directing and lending its expertise in investment advisory operations to BT Investment Managers, Inc., in contravention of the Commerce Clause (Article I, Section 8) and the Supremacy Clause (Article VI) of the Constitution of the United States.

15. The enforcement, or threatened enforcement by defendants of the challenged statute has caused injury, financial loss, loss of potential profits and loss of opportunity for corporate gain to BT Investment Managers, Inc., and Bankers Trust New York Corporation. Unless restrained by action of this Court, the enforcement or threatened enforcement by defendant of the challenged statute will cause injury, financial loss, loss of potential profits and loss of opportunity for corporate gain, to BT Investment Managers, Inc., and to Bankers Trust New York Corporation, who will be deprived of federally guaranteed rights for an indefinite period of time. Plaintiffs have no adequate or effective remedy other than the relief sought herein.

COUNT II

16. This is an action for declaratory judgment under the provisions of 28 U.S.C. § 2201, seeking to declare unconstitutional and Section 660.10 of Chapter 660 of the Florida Statutes and a portion of subsection (1) of § 659.141 of Chapter 659 of the Florida Statutes and for permanent injunction restraining the enforcement, operation and execution of the challenged statutes and of any rules, regulations, interpretations or directives which have been or may be promulgated thereunder. [Section 660.10 of the Florida Statutes and Section 659.141 of the Florida Statutes, a portion of subsection (1) of which is challenged by plaintiffs as unconstitutional, are attached hereto as Appendix A and are referred to herein as the "challenged statutes"]. Jurisdiction is conferred on this Court by 28 U.S.C. §§ 1331, and 1343(3), and a hearing before a Three Judge Court is prayed for pursuant to the provisions of 28 U.S.C. § 2281, *et seq.* The amount in controversy exceeds $10,000.00 exclusive of interest and costs.

17. Plaintiff Bankers Trust New York Corportion is a corporation organized under the laws of the State of New York, and is a "bank holding company" within the meaning of the Bank Holding Company Act, 12 U.S.C. § 1841, *et seq.* Bankers Trust New York Corporation, acting through several of its officers and agents, assisted in the organization of BT Investment Managers, Inc., as a body corporate under the laws of the State of Delaware.

18. The defendant Fred O. Dickinson, Jr., is the Comptroller of the State of Florida, ex officio Commissioner of Banking of the State of Florida, and head of the Department of Banking and Finance of the State of Florida, and is charged with supervisory authority over state-chartered banks and trust companies.

19. Section 4(c)(8) of the Bank Holding Company Act, 12 U.S.C. § 1843(c)(8), authorizes a bank holding company, with the approval of the Board of Governors of the Federal Reserve System, to acquire the shares of any company the activities of which the Board has determined to be so closely related to banking or managing or controlling banks as to be a proper incident thereto. The Board of Governors of the Federal Reserve System has provided by regulation that "performing or carrying on any one or more of the functions or activities that may be performed or carried on by a trust company (including activities of a fiduciary, agency, or custodian nature), in the manner authorized by State law so long as the institution does not both accept demand deposits and make commercial loans" is an activity "so closely related to banking or managing or controlling banks as to be a proper incident thereto". 12 C.F.R. § 225.4(a)(4).

20. Section 659.141(1) of the Florida Statutes generally prohibits any "bank, trust company, or holding company, the operations of which are principally conducted outside [Florida]", from acquiring or retaining, directly or indirectly, all or substantially all of the assets of, or control over, "any trust company having a place of business in [Florida] where trust business or functions are performed". Section 659.141(1) disqualifies any trust company having a place of business in the State of Florida from performing trust business or functions in Florida at such place of business if such business organization is owned or controlled by a bank, trust company or bank holding company the operations of which are principally conducted in another State.

21. But for the existence of the challenged statutes, Bankers Trust New York Corporation would apply to the Board of Governors of the Federal Reserve System, pursuant to 12 U.S.C. § 1843(c)(8) and 12 C.F.R. § 225.4(b)(1), for authority to engage, through a subsidiary trust company

having a national bank charter or a Florida state charter, in the activity of performing or carrying on at a place of business in Florida one or more of the functions or activities that may be performed or carried on by a trust company in the manner authorized by Florida law but without the power to accept demand deposits or make commercial loans; and would organize such a trust company under the laws of the United States or the State of Florida. So long as the challenged statute remains in effect, it would be futile for Bankers Trust New York Corporation to make such application to the Board of Governors of the Federal Reserve System or to take any steps to organize such a trust company since the challenged statute precludes the Board of Governors of the Federal Reserve System from approving such an application and the banking authorities from authorizing the organization of such a trust company.

22. Bankers Trust New York Corporation is ready, willing and able to comply with all lawful statutory, regulatory or supervisory provisions governing the conduct of the trust business in Florida.

23. The challenged statute is not designed to promote lawful regulatory objectives, but is intended to shelter those organizations presently conducting a trust business in Florida from competition by trust companies owned by out-of-state holding companies, by preventing trust company subsidiaries of holding companies like Bankers Trust New York Corporation, from marketing trust company services in Florida.

24. The challenged statute unlawfully discriminates against Bankers Trust New York Corporation and deprives Bankers Trust New York Corporation of liberty and property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

25. The challenged statute unlawfully discriminates against Bankers Trust New York Corporation, and denies Bankers Trust New York Corporation, the equal protection of the laws of the State of Florida, in contravention of the Fourteenth Amendment to the Constitution of the United States.

26. The challenged statute unlawfully suppresses commercial intercourse between Bankers Trust New York Corporation and the trust company it proposes to organize, in prohibiting Bankers Trust New York Corporation from establishing, owning, directing and lending its expertise in trust operations to such a trust company, in contravention of the Commerce Clause (Article I, Section 8) and the Supremacy Clause (Article VI) of the Constitution of the United States.

27. The enforcement, or threatened enforcement by defendant of the challenged statute has caused injury, financial loss, loss of potential profits and loss of opportunity for corporate gain to Bankers Trust New York Corporation. Unless restrained by action of this Court, the enforcement or threatened enforcement by defendant of the challenged statute will cause injury, financial loss, loss of potential profits and loss of opportunity for corporate gain, to Bankers Trust New York Corporation, who will be deprived of federally guaranteed rights for an indefinite period of time. Plaintiffs have no adequate or effective remedy other than the relief sought herein.

WHEREFORE, Plaintiffs pray as follows:

(1) That this Court convene a Three Judge Court pursuant to , U.S.C. § 2281, *et seq.*, to consider the validity under the Constitution of the United States of the challenged statutes;

(2) For judgment declaring that the challenged statutes on their face, and as applied to Plaintiffs, are invalid and unconstitutional in violation of Articles I, VI and the Fourteenth Amendment to the Constitution of the United States;

(3) For judgment permanently enjoining defendant and his agents, employees and representatives, from enforcing, seeking to enforce, or in any way relying upon the challenged statutes or any rules, regulations, interpretations or directives promulgated thereunder;

(4) For judgment granting such other and further relief as may seem just and proper to the Court.

Respectfully submitted,

MATHEWS, OSBORNE, EHRLICH, McNATT, GOBELMAN & COBB

By John E. Mathews, Jr.
1500 American Heritage Life Bldg.
Jacksonville, Florida 32202

ATTORNEYS FOR PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION
TCA 73-184

B. T. INVESTMENT MANAGERS, INC. and BANKERS TRUST NEW YORK CORPORATION,

Plaintiffs,

vs.

GERALD A. LEWIS, Comptroller of the State of Florida and Commissioner of Banking of the State of Florida,

Defendant.

DEFENDANT'S ANSWER
Filed December 12, 1977

Defendant, GERALD A. LEWIS, as Comptroller of the State of Florida and Commissioner of Banking of the State of Florida, by and through his undersigned attorneys, for its answer to the complaint herein, pleads as follows:

COUNT I

1. Defendant is without knowledge of the allegations contained in Paragraph one (1) of the complaint.

2. Defendant is WITHOUT KNOWLEDGE of the allegations in Paragraph two (2) of the complaint.

3. Defendant is WITHOUT KNOWLEDGE of the allegations in Paragraph three (3) of the complaint, as to Plain-

tiff's assistance in the organization of B. T. INVESTMENT MANAGERS, INC. Defendant ADMITS that Plaintiff Bankers Trust may be a "bank holding company" within the meaning of the Bank Holding Company Act, 12 U.S.C. §1841, *et seq.*

4. Defendant ADMITS the allegations of Paragraph four (4) of the complaint, noting that Gerald A. Lewis succeeded to the office of the Comptroller and has been substituted as a party defendant in the above-styled cause.

5. As to allegations of Paragraph five (5) of the complaint, Defendant ADMITS the existence of Section 4(c)(8) of the Bank Holding Company Act, 12 U.S.C. § 1843(c)(8), as amended December 31, 1970, P.L. 91-607, Title I, § 103 (1-7), 84 Stat. 1764-1765. Defendant ADMITS the existence of 12 C.F.R. § 225.4(a)(5). Defendant states that the above speak for themselves.

6. Defendant ADMITS the allegations of the first two sentences of Paragraph six (6) of the complaint. Defendant is WITHOUT KNOWLEDGE as to the third sentence as it is a legal conclusion. Defendant would state that Section 659.141(1) speaks for itself.

7. Defendant ADMITS the allegations of Paragraph seven (7) of the complaint.

8. Defendant ADMITS the allegations of Paragraph eight (8) of the complaint.

9. Defendant is WITHOUT KNOWLEDGE of the allegations of Paragraph nine (9) of the complaint.

10. Defendant is WITHOUT KNOWLEDGE of the allegations of Paragraph ten (10) of the complaint.

11. Defendant DENIES the allegations of Paragraph

eleven (11) of the complaint.

12. Defendant DENIES the allegations of Paragraph twelve (12) of the complaint.

13. Defendant DENIES the allegations of Paragraph thirteen (13) of the complaint.

14. Defendant DENIES the allegations of Paragraph fourteen (14) of the complaint.

15. Defendant DENIES the allegations of Paragraph fifteen (15) of the complaint.

COUNT II

16. Defendant is WITHOUT KNOWLEDGE of the allegations in Paragraph sixteen (16) of the complaint.

17. As to the allegations in Paragraph seventeen (17) of the complaint, Defendant realleges his answer in Paragraph three (3) above.

18. Defendant ADMITS the allegations of Paragraph eighteen (18) of the complaint, noting that GERALD A. LEWIS succeeded to the office of the Comptroller and has been substituted as a party defendant in the above styled cause.

19. As to the allegations in Paragraph nineteen (19) of the complaint, Defendant realleges his answer in Paragraph five (5) as it relates to 12 U.S.C. § 1843(c)(8). Defendant further ADMITS the existence of 12 C.F.R. § 225.4(a)(4), and states that it speaks for itself.

20. As to the allegations in Paragraph twenty (20) of the complaint, Defendant realleges his answer in Paragraph six (6) above.

21. Defendant is WITHOUT KNOWLEDGE of the allegations of Paragraph twenty-one (21) of the complaint.

22. Defendant is WITHOUT KNOWLEDGE of the allegations in Paragraph twenty-two (22) of the complaint.

23. Defendant DENIES the allegations in Paragraph twenty-three (23) of the complaint.

24. Defendant DENIES the allegations in Paragraph twenty-four (24) of the complaint.

25. Defendant DENIES the allegations in Paragraph twenty-five (25) of the complaint.

26. Defendant DENIES the allegations in Paragraph twenty-six (26) of the complaint.

27. Defendant DENIES the allegations in Paragraph twenty-seven (27) of the complaint.

Respectfully submitted,

FRANKLYN J. WOLLETT
Assistant General Counsel
Office of the Comptroller
The Capitol
Tallahassee, Florida 32304
(904) 488-9896

Counsel for Defendant

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION
TCA 78-184

STIPULATION

Filed May 11, 1978
[Caption Omitted in Printing]

Come now the parties, by and through their undersigned attorneys, and stipulate and agree for the purposes of this litigation as follows:

1. This is an action for declaratory judgment under the provisions of 28 U.S.C. § 2201 seeking to declare unconstitutional a portion of Subsection (1) of Section 659.141 of Chapter 659 of the Florida Statutes and Section 660.10 of Chapter 660 of the Florida Statutes, and for permanent injunction restraining the enforcement, operation and execution of the challenged statutes and any rules, regulations, interpretations or directives which have been or may be promulgated thereunder. Jurisdiction is conferred on this Court by 28 U.S.C. § s 1331 and 1343(3), and the empanelment of a three-judge Court to resolve this cause is authorized by 28 U.S.C. §s 2281, *et seq.* The amount in controversy exceeds $10,000.00 exclusive of interest and costs.

2. Plaintiff, BT INVESTMENT MANAGERS, INC., is a corporation organized under the laws of the State of Delaware, wholly owned by Plaintiff, BANKERS TRUST NEW YORK CORPORATION, with total authorized capital stock of $1,000.00, consisting of 1,000 shares of common stock with a par value each of $1.00. On November 27, 1972, BT INVESTMENT MANAGERS, INC., qualified under the laws of the State of Florida to do business in Florida. The offices of BT INVESTMENT MANAGERS, INC., not currently

located in Florida, will be located in Palm Beach, Florida. The Certificate of Incorporation of BT INVESTMENT MANAGERS, INC. was filed November 24, 1972.

3. Plaintiff, BANKERS TRUST NEW YORK CORPORATION, is a corporation organized under the laws of the State of New York, and is a "bank holding company" within the meaning of the Bank Holding Company Act, 12 U.S.C. § 1841, *et seq.* BANKERS TRUST NEW YORK CORPORATION, acting through several of its officers and agents, assisted in the organization of BT INVESTMENT MANAGERS, INC. as a body corporate under the laws of the State of Delaware.

4. During the pendency of the application of Plaintiff, BANKERS TRUST NEW YORK CORPORATION, identified in paragraph 7 of the Complaint herein, Defendant and representatives of the Florida Bankers' Association filed with the Board of Governors of the Federal Reserve System objections to said application citing prohibitions of Florida Statutes, § 659.141(1), as amended December 21, 1972.

5. Attached hereto as Exhibit "A" is a true and correct copy of the Order of the Board of Governors of the Federal Reserve System, dated April 26, 1973, denying the application of Plaintiff, BANKERS TRUST NEW YORK CORPORATION, referred to in paragraph 7 of the Complaint filed herein.

6. But for the existence of the challenged statutes, BANKERS TRUST NEW YORK CORPORATION would have applied to the Board of Governors of the Federal Reserve System, pursuant to 12 U.S.C. § 1843(c)(8) and 12 C.F.R. § 225.4(b)(1), for authority to engage, through a subsidiary trust company having a national bank charter or a Florida state charter, in the activity of performing or carrying

on at a place of business in Florida one or more of the functions or activities that may be performed or carried on by a trust company in the manner authorized by Florida law but without the power to accept demand deposits or make commercial loans; and would have organized such a trust company under the laws of the United States or the State of Florida.

7. BT INVESTMENT MANAGERS, INC. is amenable to process issued by the courts of the State of Florida, and is ready, willing and able to comply with all lawful statutory, regulatory or supervisory provisions governing the conduct of the investment advisory business in Florida.

8. BANKERS TRUST NEW YORK CORPORATION is ready, willing and able to comply with all lawful statutory, regulatory or supervisory provisions governing the conduct of the trust business in Florida.

9. The enforcement, or threatened enforcement by Defendant of the challenged statutes, and each of them, has caused injury, loss of potential profits and loss of opportunity for corporate gain to BT INVESTMENT MANAGERS, INC. and BANKERS TRUST NEW YORK CORPORATION. Unless restrained by action of this Court, the enforcement or threatened enforcement by Defendant of the challenged statutes will cause injury, loss of potential profits and loss of opportunity for corporate gain, to BT INVESTMENT MANAGERS, INC. and to BANKERS TRUST NEW YORK CORPORATION.

10. Attached hereto as Exhibit "B" is a true and correct copy of § 4(c)(8) of the Bank Holding Company Act, 12 U.S.C. §1843(c)(8).

11. Attached hereto as Exhibit "C" is a true and correct

copy of the regulation of the Board of Governors of the Federal Reserve System at 12 C.F.R. § 225.4(a)(4).

12. Attached hereto as Exhibit "D" is a true and correct copy of the regulation of the Board of Governors of the Federal Reserve System at 12 C.F.R. § 225.4(a)(5).

13. Attached hereto as Exhibit "E" is a true and correct copy of the regulation of the Board of Governors of the Federal Reserve System at 12 C.F.R. § 225.4(b)(1).

14. Attached hereto as Exhibit "F" is a true and correct copy of § 659.141(1) of Chapter 659 of the Florida Statutes as it existed prior to December 21, 1972.

15. Attached hereto as Exhibit "G" is a true and correct copy of § 659.141(1) of Chapter 659 of the Florida Statutes as amended December 21, 1972.

16. Attached hereto as Exhibit "H" is a true and correct copy of § 660.10 of Chapter 660 of the Florida Statutes.

Mathews, Osborne, Ehrlich,
McNatt, Gobelman & Cobb

STEPHEN E. DAY
Attorneys for Plaintiffs
1500 American Heritage
Life Building
Jacksonville, Florida 32202
(904) 354-0624

FRANKLYN J. WOLLETT
Assistant General Counsel
Office of the Comptroller
The Capitol
Tallahassee, Florida 32304
(904) 488-9896

[Certificate of Service Omitted in Printing]

FEDERAL RESERVE SYSTEM
BANKERS TRUST NEW YORK CORPORATION
Order Denying Proposal to Act as an Investment Adviser

Bankers Trust New York Corporation, New York, New York ("BTNYC"), a bank holding company within the meaning of the Bank Holding Company Act, has proposed under § 4(c)(8) of the Act and § 225.4(b)(1) of the Board's Regulation Y, to engage indirectly *de novo* in the performance of certain investment advisory activities, through B T Investment Managers, Inc., Palm Beach, Florida ("BTIM"), a wholly-owned subsidiary of BTNYC.

Notice of the proposal, affording opportunity for interested persons to express or submit comments and views on the proposal, has been published (September 25, 1972, *The Wall Street Journal* and September 26, 1972, West Palm Beach *Commercial Record*) in accordance with § 225.4(b)(1) of the Board's Regulation Y. The time for filing comments and views has expired, and all those received, including those of the Comptroller of Florida, the Florida Bankers Association, and the Palm Beach County Bankers Association, Inc., have been considered in light of the factors set forth in § 4(c)(8) of the Act (12 U.S.C. 1843(c)(8)). Among those letters commenting on the proposal were requests for a hearing; those persons seeking a hearing were asked what substantial issues of material fact, if any, were presented by the instant proposal and why any issues raised could not be resolved by the submission of written comments. Prior to receipt of responses to these questions, the Board was apprised that, on November 30, 1972, the Florida Legislature enacted legislation[1] that became effective on December 21,

EXHIBIT "A"

[1] The legislation amended section 659.141 of the *Florida Statutes*. Section 659.141, as amended, provides, in pertinent part:

1972. Subsequently, the Board entertained briefs and written argument on the issue of the applicability and effect of the amended statute on the instant proposal from those persons that had requested to be heard.

Absent the recent enactment of amendments to section 659.141 and any evidence indicating that *de novo* entry in this case would have the purpose or effect of foreclosing future competition or would otherwise be contrary to the public interest,[2] it appears likely that the Board would have approved the instant proposal. The Board recognizes, as has Congress, "that an activity commenced *de novo* will tend to have pro-competitive effects, and consequently should be viewed more favorably than the commencement of an activi-

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Footnote 1 cont'd.

659.141(1) Control; ownership. --
(1) Except as provided in subsection (3) of this section, no bank, trust company, or holding company, the operations of which are principally conducted outside this state, shall acquire, retain, or own, directly or indirectly, all or substantially all the assets of, or control over, any bank or trust company having a place of business in this state where the business of banking, or trust business or functions are conducted, or acquire, retain or own all or substantially all of the assets of, or control over, any business organization having a place of business in this state where or from which it furnishes investment advisory services in this state. However, if a bank, trust company, or holding company directly or indirectly owning all or substantially all the assets of, or having control over, a bank or a trust company or business organization to which the restrictions and prohibitions of this section apply, having acquired such assets or control prior to becoming disqualified hereunder, shall, on or after the effective date of this section, be or become disqualified hereunder to acquire, retain or own the same, the restrictions and prohibitions of this section shall not be enforced against it for a period which, under all the circumstances, is determined by the department to be reasonable, not exceeding two years from the effective date of

ty through the acquisition of an existing concern"[3] and "where a bank holding company enters a new market *de novo* . . ., its desire to succeed in its new endeavor is more likely to be competitive".[4] However, while the instant proposal was pending before the Board, the Florida Statutes were amended to generally prohibit the provision of investment advisory services in Florida by non-Florida-based bank holding companies through control of business organizations having offices in Florida. The legislation further provides however that the restrictions and prohibitions contained therein shall not be enforced for a period of time ranging up to five years against any holding company which, prior to the effective date of such legislation, acquired control over a business organization to which the restrictions or prohibitions of the statute apply.

Footnote 1 cont'd.

this act or from the date it becomes disqualified hereunder, whichever is later, unless said period of two years is extended by the department as herein provided. The department is authorized, upon a showing of undue hardship, to extend said period of two years from time to time if the department determines that any such extension would not be detrimental to the public interest, but any such extension shall not exceed one year and all thereof shall not in the aggregate exceed three years.

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(2) . . .

(c) A business organization provides investment advisory services if, in this state for compensation, it engages in the business of advising persons, as defined in § 1.01(3), Florida Statutes, either directly or indirectly or through publications or writings, as to the value of securities or as to the advisability of investment in or purchasing securities, or if, not being a certified public accountant, in this state and for compensation, it issues or distributes to persons, as defined in § 1.01(3), Florida Statutes, analyses or reports concerning securities.

There appears to be tacit agreement that the recently-enacted legislation was intended to, and does, prohibit the performance of investment advisory services in Florida by non-Florida bank holding companies. However, BTNYC has contended that, under the "grandfather" provision in the statute, BTIM may open for business and engage in the provision of investment advisory services for a period of approximately two years. The protestants to the proposal, with the concurrence of the Comptroller of Florida, have contended that the "grandfather" benefit, conferred by the newly-enacted legislation, is not available to BTNYC or BTIM. However, assuming, without deciding, that the construction given the "grandfather" provision by BTNYC is correct, the Board perceives, as a possible adverse effect of the instant proposal, the indefinite and temporary nature of BTIM's performance of investment advisory services. The public is ill-served by a firm offering investment advisory services that may, by law, have to be terminated within a relatively short time period. Customers entering into contracts for such services would generally do so in reliance upon the continuing and long-term nature of such services. In another sense, one may question the vigor with which an entrant into a market will compete and the quality of the services it will offer, if its employees are burdened by the realization that, irrespective of their performance, their duty is only tempo-

[2]See the Board's Order of March 6, 1973, denying the application of First at Orlando Corporation to acquire shares of Citrus First National Bank of Leesburg, 38 *Federal Register* 6317 (March 8, 1973) and the Board's Statement accompanying its Order of March 9, 1973 approving, to the extent permitted by State law, the proposal of NCNB Corporation to engage in certain trust activities in South Carolina through American Trust Company, 1973 *Federal Reserve Bulletin* 305.

[3]*S. Rep.* No. 91-1084, 91st Cong., 2d Sess. 16 (1970).

[4]*H. R. Rep.* No. 91-1747, 91st Cong., 2d Sess. 17 (1970).

rary and the office may be closed at any time. However, in view of the disposition of the instant proposal on other grounds, the Board is not required to decide at this time whether the possibility of such an adverse effect is of sufficient weight as to outweigh the public benefits that may reasonably be expected to derive from the instant proposal, notably the increased competition probably resulting from *de novo* entry.

In addition to the factors that the Board is, by statute, required to consider, the Board, in any particular case, must determine whether the proposal would be prohibited by State law. If the proposal would be so prohibited, the Board may not approve it.[5] In making such a determination, the Board will presume the constitutional validity of any pertinent State statute.[6] The interpretation and construction of controverted State statutes is a task that is not eagerly undertaken by the Board. Certainly, the courts of Florida are a more appropriate forum for the resolution of disputed questions of Florida law, than is the Board. Nevertheless, the Board believes that the principle laid down by the Supreme Court in the *Whitney* case requires the Board to initially resolve the legal issue presented here.

The issue which is determinative of the instant proposal is whether the "grandfather" provision of the recently-enacted legislation effectively permits BTNYC to initiate

[5]*Whitney National Bank in Jefferson Parish v. Bank of New Orleans & Trust Co.*, 379 U.S. 411 (1965).

[6]See Statement accompanying the Board's Order of March 9, 1973, approving, to the extent permitted by State law, the proposal of NCNB Corporation, Charlotte, North Carolina, to operate a trust company in South Carolina through American Trust Company, 1973 *Federal Reserve Bulletin* 305.

investment advisory services from a Florida office, albeit for an indefinite and temporary period of time. BTNYC states, and, in the absence of any evidence to the contrary, the Board finds that BTIM was incorporated in the State of Delaware on November 24, 1972, at the direction of BTNYC, and that, on November 27, 1972, BTIM qualified with the Secretary of State of Florida to do business in Florida. However, BTNYC has not alleged that BTIM, at any time, has had a place of business in Florida or that BTIM has furnished investment advisory services in Florida. Nor could BTIM legally have done so, the prior approval of the Board not having been secured by BTNYC. It is not contended that BTIM is either a bank or trust company.

On the basis of these facts, BTNYC contends, and the protestants do not contend otherwise, that BTIM is a "business organization"; that BTNYC has "control" over BTIM and had acquired that control prior to becoming disqualified under the newly-enacted legislation. The protestants, on the other hand, contend that, irrespective as to whether BTIM is a "business organization" or whether BTNYC controlled BTIM prior to the effective date of the amendment, BTNYC is not entitled to "grandfather" benefits because BTIM did not furnish investment advisory services in Florida from a place of business in Florida on the effective date of the legislation. In the Board's opinion, the conclusion is inescapable that the "grandfather" provision of the legislation only applies to a bank, trust company or business organization "having a place of business in [Florida] where or from which it furnishes investment advisory services in [Florida]" on the effective date of the legislation. Since BTIM is neither a bank or a trust company, and did not have on that date a place of business in Florida where or from which it furnished or provided investment advisory services, the Board concludes, as a matter of law, that BTNYC is not entitled to the benefits of the "grandfather" provision in section 659.141.

Furthermore, the legislative history of the legislation evidences a legislative intent to exclude BTNYC from engaging in the provision of investment advisory services in Florida from a Florida office. In view of the conflicting constructions given the "grandfather" provision, the Board believes that an examination of the legislative history of the legislation is appropriate to ascertain the legislative intent. It is beyond question, and BTNYC and the protestants are in agreement, that the notice that BTNYC published in September, 1972, triggered the action of the Florida Legislature in this case and that the newly-enacted legislation was primarily motivated by the threat of BTNYC's entry into the Florida investment advisory markets and was intended to prevent such entry. Accordingly, the Board concludes that, the "grandfather" provision was not intended to permit the instant proposal, even for a limited period of time.

BTNYC, besides contending that the Board should refrain from construing the newly-enacted Florida legislation, contends that they are entitled to "grandfather" benefits because the "grandfather" provision, which authorizes the Florida Banking Department to determine the length of time during which the statute shall not be enforced against a company entitled to "grandfather" benefits, constitutes an unconstitutional delegation of authority to that agency. As the Board has previously indicated, it will presume the constitutional validity of State statutes. BTNYC's challenge to the constitutionality of any provision of the recently-enacted Florida legislation is properly cognizable only by the judiciary. In brief, since the Board is of the opinion that the proposal is prohibited by State law, it believes that, under the doctrine set forth by the U.S. Supreme Court in *Whitney*, it must deny the proposal.

The Board is not unsympathetic with BTNYC when that holding company questions "the fairness and legality of a procedure whereby proponents of this legislation could pre-

vent [its] proposal from becoming effective by filing objections with the Board and requesting a hearing and then, after hasty enactment of legislation, argue that this very legislation should be the basis for the Board to bar approval of [its] proposal." There is substantial evidence that the celerity with which the legislation was enacted is directly attributable to the pendency of the instant proposal before the Board. However, section 7[7] of the Act expressly reserves to the States the authority to adopt legislation in the exercise of their powers and jurisdiction with respect to banks, bank holding companies, and their subsidiaries, and the U.S. Supreme Court in *Whitney* expressly instructed the Board to consider the applicability and effect of any such legislation. Accordingly, irrespective of any doubt the Board may entertain as to the wisdom or desirability of a particular State enactment, the Board must, and will, respect, and act in the light of, pertinent State legislative judgments.

Based upon the record and for the reasons expressed herein, the proposal of BTNYC Corporation to provide investment advisory services in Florida through the instrumentality of BTIM, is hereby denied.

By order of the Board of Governors,[8] effective April 26, 1973.

CHESTER B. FELDBERG
Assistant Secretary of the Board

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[7] Section 7 of the Act provides

> The enactment by the Congress of the Bank Holding Company Act of 1956 shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof. (12 U.S.C. 1846)

[8] Voting for this action: Vice Chairman Robertson and Governors Daane, Brimmer, Sheehan, and Bucher. Absent and not voting: Chairman Burns and Governor Mitchell.